

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES V. KELLY; CRESCENT BAR
CONDOMINIUM MASTER ASSOC., et al.,

Plaintiffs,

vs.

PUBLIC UTILITY DISTRICT NO. 2., et al.,

Defendants.

NO. CV-11-023-JLQ

**AMENDED¹ ORDER GRANTING
PORT OF QUINCY'S MOTION TO
JOIN AND DENYING
DEFENDANTS' MOTION TO
DISMISS**

BEFORE THE COURT are Defendant Grant County PUD's Motion to Dismiss (ECF No. 37) for lack of subject matter jurisdiction and Defendant Port of Quincy's Motion to Join (ECF No. 54).

Under § 313(b) of the Federal Power Act, 16 U.S.C. § 791a et seq., judicial review of Federal Energy Regulatory Commission ("FERC") orders, including licensing and surrender decisions, may only be had in the U.S. Court of Appeals for any circuit in which the licensee is located or in the U.S. Court of Appeals for the District of Columbia. 16 U.S.C. § 8251(b). The sole issue before the court is whether or not the claims asserted by Plaintiffs in this case constitute a collateral attack on the PUD's FERC license and therefore must be heard in the Court of Appeals.

I. BACKGROUND

The parties do not dispute the facts surrounding the issue of jurisdiction.

¹ Page 13 of the court's July 8, 2011 Order contained a typo referencing ECF No. 61, which is a pending Motion to Dismiss filed by the Crescent Bar Recreational Home Owners Association. As this Order does not pertain to that motion, this amendment corrects the reference to ECF No. 37, which is the PUD's Motion to Dismiss.

1 *A. Federal Power Act*

2 In 1920, Congress created the Federal Power Commission (FPC) through the
 3 Federal Power Act (“FPA”), codified at 16 U.S.C. § 791a et seq. The FPC had the
 4 authority to issue licenses to operate and maintain transmission lines and other related
 5 power facilities. 16 U.S.C. § 797(e). In 1958 Congress amended the FPA, to include
 6 subsection (a) of section 825l provides that “any person ... aggrieved by an order issued
 7 by the Commission” may apply for a rehearing before the Commission. 16 U.S.C. §
 8 825l(a). It also provides that only an entity that applied for a rehearing may bring an
 9 action to review an order of the Commission. Subsection (b) states:

10 Any party to a proceeding under this chapter aggrieved by an order issued by the
 11 Commission in such proceeding may obtain a review of such order in the United
 12 States Court of Appeals for any circuit wherein the licensee or public utility to
 13 which the order relates is located or has its principal place of business, or in the
 United States Court of Appeals for the District of Columbia, by filing in such
 court, within sixty days after the order of the Commission upon the application for
 rehearing

14 2 16 U.S.C. § 825l(b).

15 The other judicial review provision in the FPA states:

16 The District Courts of the United States ... shall have exclusive jurisdiction of
 17 violations of this chapter or the rules, regulations, and orders thereunder, and of all
 18 suits in equity and actions at law brought to enforce any liability or duty created
 by, or to enjoin any violation of, this chapter or any rule, regulation, or order
 thereunder.

19 16 U.S.C. § 825p. As of 1958, therefore, section 825l provided for Court of Appeals
 20 review of orders issued by the “Commission” under the FPA and section 825p provided
 21 for exclusive District Court review for claims of violations of the FPA and violations of
 22 orders issued pursuant to the FPA. 16 U.S.C. §§ 825l(b), 825p.

23 Congress dissolved the FPC and created the Department of Energy (“DOE”) and
 24 the Federal Energy Regulatory Commission (“FERC”) in 1977. Section 825l of the FPA
 25 was applied to FERC. *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual,*
 26 *Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765, 777 n. 19 (1984).

27 ***B. Crescent Bar Island***

28 In 1955, FERC issued a 50-year license to the Public Utility District No. 2 of Grant

1 County to operate the Priest Rapids Hydroelectric Project on the Columbia River.
2 Crescent Bar Island ("CBI") is an island located in the Columbia River within the project
3 boundaries. In 1962, the PUD entered into a lease of CBI to the Port of Quincy for
4 "public and recreational purposes" which lease was scheduled to terminate in fifty-years
5 in 2012 ("PUD-Port lease"). The 1962 PUD-Port lease includes a provision
6 incorporating by reference the terms and conditions of the 1955 FERC license. In 1970,
7 the Port subleased a portion of the island to a developer, the predecessor of Crescent Bar,
8 Inc. ("Port-Crescent lease"), which sold leasehold interests to members of the public for
9 the development of recreational homes and condominiums on the island.

10 The Complaint alleges that in 1973 the Port-Crescent lease was modified to
11 expressly extend the term of Crescent's leasehold from 2012 to February 28, 2023
12 (because of the "financing requirements of the contemplated improvements").
13 Thereafter, the PUD and Port are claimed to have entered into an amendment extending
14 the term of the 1962 PUD-Port lease to 2023, subject to FERC approval. That agreement
15 stated the parties would "promptly...submit" their proposed extended sublease for
16 approval of FERC. ECF No. 46, Ex. B. The Complaint further alleges that in 1975, the
17 Port, with approval of the PUD, entered into an agreement which identified a dispute
18 between the parties regarding the term of the Crescent lease. In 1979, the PUD, the Port
19 and Crescent are alleged to have entered into a new lease (replacing all prior agreements),
20 which included a term providing that the PUD, Port, and Crescent "reaffirm their desire
21 to extend the term of the June 5, 1962 and this Lease Agreement until February 28,
22 2023," subject to FERC approval. ECF No. 40, Ex. B at 31. The 1979 lease also stated
23 that "Application to the [FERC] for approval....shall be required..." *Id.* at 34. The Port
24 also agreed that upon request, it would exercise "reasonable diligence" to get an
25 extension of its lease with the PUD in order to give Crescent a fifty(50)-year extension of
26 its lease term. ECF No. 40, Ex. B, at 48-49.

27 Paragraph 3.20 of the Complaint, at page 13, lists eight instances over the next two
28 decades in which the PUD expressed its commitment to the lease extension and/or to seek

1 FERC approval. Though there is no allegation FERC ever formally approved any lease
2 terms, CBI private residential units were constructed and interests sold. Plaintiffs are
3 condominium leasehold owners (and associations acting on behalf of owners) who have
4 made substantial investments in CBI. In 1999, FERC determined in an Order that “after
5 1965, all leases of projects lands needed Commission approval” and that subsequent
6 subleases purporting to extend the term to 2023 “have not received commission
7 approval.” ECF No. 40, Ex. E. In a footnote of that decision, the Commission noted that
8 the PUD “has long been aware of the need for Commission approval of its lease
9 agreements...” In 1973, the Commission apparently declined to approve the lease terms
10 beyond the term of the existing license. Though the Commission changed its policy in
11 1980 to allow approval of leases extending beyond the license term, the PUD did not
12 subsequently seek Commission approval. *Id.*

13 In 2005, the PUD’s FERC license was to expire. In 2003, the PUD applied for a
14 new license. In 2008, FERC granted the PUD a new forty-four (44)- year license. The
15 2008 License requires the PUD to develop and submit a final Shoreline Management Plan
16 (“SMP”). In April 2010, the PUD submitted to FERC a SMP which would *eliminate*
17 residential use of CBI after 2012. Plaintiffs have intervened in the FERC proceeding to
18 challenge the proposed SMP. The FERC proceeding regarding the SMP is still ongoing.
19 FERC has not decided whether to approve or reject the SMP. Plaintiffs contend in the
20 FERC proceeding that the proposed SMP is inconsistent with the License, violates
21 NEPA, and would have the effect of evicting and displacing existing residents.

22 Meanwhile, the PUD has ordered Plaintiffs to vacate the premises on or before
23 June 1, 2012. The Plaintiffs believe they have either a right to maintain and occupy their
24 residences at least until 2023 and/or a right to just compensation for being removed
25 earlier than anticipated. Plaintiffs take the position that the PUD had a legal obligation to
26 seek FERC’s approval of the lease extension, but that it has failed to do so.

27 Plaintiffs filed this lawsuit on January 19, 2011 asking this court to adjudicate the
28 rights it claims pursuant to written and oral agreements with the Defendants, specifically

the right “to maintain and occupy their residences on Crescent Bar Island.” ECF 45 at 2. The Complaint seeks damages, specific performance, and injunctive relief against the Defendants based on theories of breach of contract, promissory estoppel, and violations of due process under 42 U.S.C. § 1983. Plaintiffs prayer for relief requests the following relief:

1. For specific performance of the 2023 lease termination date.
2. For specific performance of the PUD’s promise to negotiate a new lease with Plaintiffs, a term of which shall be coincident with the term of the 2008 License;
- 2 [sic]. For injunctive relief prohibiting any Defendant from evicting Plaintiffs from the Property;
3. In the alternative, for damages in such amount as the court deems just and equitable;
4. For reasonable attorney fees and costs;
5. For such other and further relief as the Court deems just and equitable.

ECF No. 1 at 28.

On April 1, 2011, the PUD filed a Motion to Dismiss for lack of jurisdiction. The Port has filed a separate motion to join in the Motion to Dismiss. Plaintiffs jointly opposed and Defendants replied.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) authorizes a motion to dismiss for lack of subject matter jurisdiction over an entire action or over specific claims. “Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Limits upon federal jurisdiction must not be disregarded or evaded. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). A plaintiff has the burden to establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). “A

1 Rule 12(b)(1) jurisdictional attack may be either facial or factual.” *Safe Air v. Meyer*, 373
 2 F.3d 1035, 1039 (9th Cir.2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
 3 2000)). “In a facial attack, the challenger asserts that the allegations contained in a
 4 complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* By contrast, a
 5 factual attack “disputes the truth of the allegations that, by themselves, would otherwise
 6 invoke federal jurisdiction.” *Id.* Three different standards apply in the evaluation of a
 7 Rule 12(b)(1) motion, depending upon how the motion is made and what it addresses.

8 The Defendants’ motion is a facial attack, therefore the factual allegations of the
 9 complaint are presumed to be true and conflicts in the pleadings are resolved in the
 10 plaintiff’s favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (internal citations
 11 omitted); *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir.2002). The
 12 court need merely to look at the complaint to determine whether the plaintiff has
 13 sufficiently alleged a basis of subject matter jurisdiction. To survive such a motion, the
 14 plaintiff need only make a prima facie showing of jurisdiction. *Rio Props., Inc.*, 284 F.3d
 15 at 1019.

16 **III. DISCUSSION**

17 The sole question before the court is whether Section 313(b), 16 U.S.C. § 825l, of
 18 the Federal Power Act which provides for exclusive court of appeals jurisdiction, applies.
 19 Plaintiffs argue their claims are not subject to the provision because their claims are
 20 based upon separate and distinct contracts not an attack on the license or any decision of
 21 FERC, nor would the relief sought deprive the PUD of its ability to fulfill its obligations
 22 under its FERC license.

23 **A. Law Applying the Exclusive Jurisdiction Clause**

24 The *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) is the seminal
 25 U.S. Supreme Court case concerning the scope of scope of the exclusive jurisdiction
 26 provision of the Federal Power Act. In that case the Supreme Court reversed the
 27 Washington Supreme Court which had affirmed an order enjoining the City from
 28 proceeding to construct a power project for which it had been issued a license by FERC

1 to build. In finding that the exclusive jurisdiction provision applied to the state court
2 dispute, the Court held,

3 provision necessarily preclude[s] de novo litigation between the *parties of*
4 *all issues inhering in the controversy*, and all other modes of judicial review. Upon
5 judicial review of the Commission's order, all objections to the order, to the license
[the order] directs to be issued, and to the legal competence of the licensee to
execute [the order's] terms, must be made in the court of appeals or not at all.

6 *Id.* at 336. The Supreme Court added that the test for determining whether Section
7 313(b) precludes a district court from hearing a particular claim is not whether the claim
8 was presented to and decided by a Court of Appeals, but rather whether the claim “could
9 and should have been” presented to and decided by a Court of Appeals. *Id.* at 339. The
10 Supreme Court added that the test for determining whether Section 313(b) precludes a
11 District Court from hearing a particular claim is not whether the claim was presented to
12 and decided by a Court of Appeals, but rather whether the claim “could and should have
13 been” presented to and decided by a Court of Appeals. *Id.* at 339.

14 The Ninth Circuit Court of Appeals has specifically addressed the applicability of
15 the Federal Power Act’s exclusive jurisdiction clause in several cases, holding for
16 instance that a plaintiff may not escape this exclusive review process through artful
17 pleading. In *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908 (9th Cir.
18 1989), for example, FERC issued a license to construct a hydroelectric power facility in
19 the Sierra National Forest. After failing to get relief in the administrative process,
20 plaintiffs filed suit seeking injunctive and declaratory relief in federal District Court
21 against the U.S. Forest Service under the National Environmental Policy Act and the
22 American Indian Religious Freedom Act. The Plaintiffs contended “that they [were] not
23 attacking the licensing decision made by FERC but instead [were] seeking review only of
24 the ... failure to follow the procedural and substantive steps outlined in statutes outside
25 the purview of power and energy regulation.” *Cal. Save Our Streams Council*, 887 F.2d
26 at 911. The Ninth Circuit rejected the contention finding that the suit was “an attempt to
27 restrain the licensing procedures authorized by FERC” with “the practical effect” being
28 “an assault on an important part of the FERC license.” *Id.* at 912. Finally, the court held

1 that the suit would result “in substantial disruption of the statutorily mandated licensing
2 procedure.” *Id.*

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4
5 In *Skokomish Indian Tribe. v. U.S.*, 410 F.3d 506 (9th Cir. 2005), the Tribe sued the
6 City of Tacoma for damages based upon the City’s operation of a “sine qua non” of a
7 hydroelectric project namely, the flooding of 8.8 acres of federal (reservation) land. The
8 Tribe sued the City under its Treaty, 42 U.S.C. § 1983, the Constitution, and federal
9 common law. Though the Tribe did not seek to modify, rescind or set aside FERC’s
10 licensing order, the Ninth Circuit held that the District Court did not have jurisdiction
11 because the claims “flow[ed] directly from FERC’s licensing order” due to the fact that
12 1) the City was acting in accordance with its license and 2) FERC had specifically issued
13 a required finding for the license that the project would not interfere with the
14 reservation’s purpose.

15 In *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir.
16 1994), the Ninth Circuit found that the District Court did have jurisdiction to hear the
17 Indian Tribe’s claim for trespass and damages because the harm complained of (also
18 flooding) was not authorized by the license and unlike in *Skokomish Indian Tribe*, there
19 was no finding that the license would not interfere with the reservation’s purpose.

20 **B. Analysis**

21 The PUD and Port Defendants seek the dismissal of all of Plaintiffs claims,
22 claiming the “*suit* implicates and flows from FERC’s licensing order.” Despite this
23 general contention regarding the entirety of Plaintiffs’ action, the PUD’s briefing focuses
24 on the fact that “Plaintiffs seek the same outcome –longer occupation of Crescent Bar
25 Island – in two different forums.” ECF No. 58 at 9. This requested relief concerns that
26 portion of Plaintiffs’ Complaint requesting *specific performance* (and injunctive relief).
27 However, the Complaint seeks damages as well.

28 *1. Plaintiffs’ Prayer for Specific Performance and Injunctive Relief*

1 The first three requests in the Complaint's prayer for relief directly implicate the
2 future use of CBI. It requests: "specific performance of the 2023 lease termination date"
3 and "specific performance of the PUD's promise to negotiate a new lease with Plaintiffs,
4 a term of which shall be coincident with the term of the 2008 License". The court agrees
5 with the PUD that these claims are intertwined with the FERC license and license
6 proceedings because these claims request the court to order relief which would effect how
7 CBI is utilized going forward, a matter currently before FERC.

8 Plaintiffs assert the narrow argument that if, as the PUD has suggested, the 2008
9 License did not decide the issue of whether continued residential use of CBI would or
10 would not be approved, then Plaintiffs claims for the continued occupation of CBI can
11 not be considered a collateral attack on the license. Plaintiffs also contend that this suit
12 would not interfere with any FERC decision on the future use of CBI. They claim that
13 even if the court granted the requested relief and FERC failed to approve the residential
14 use of the property to at least 2023, the PUD would retain the ability to satisfy its
15 obligation to comply with FERC's decision by acquiring the Plaintiffs leasehold interests
16 either by agreement or by the exercise of eminent domain with just compensation. ECF
17 No. 45 at 16, 19.

18 The FPA vests in FERC the authority to issue licenses and impose conditions on
19 licensees. The FERC license, licensing procedure, and prior orders give FERC the first
20 authority to decide the permissible uses of the Project's property, and to decide whether
21 to approve subleases involving Project property. It is undisputed that the PUD's conduct
22 is controlled by FERC's license, and the FERC license is necessarily a term that can alter
23 the contours of the Plaintiffs' leasehold interests on CBI. The Shoreline Management
24 Plan is one part of that license. If as part of the licensing process, FERC does not
25 approve the continued occupancy of CBI as part of the SMP, Plaintiffs admit a challenge
26 to that decision could not brought in this forum. ECF No. 45 at 16. Accordingly, the
27 court's ability to grant specific performance or injunctive relief concerning Plaintiffs'
28 continued occupancy of CBI, hinges upon FERC's approval or disapproval of that type of

1 continued use of the property. It is FERC's, not this court's, role to decide whether to
 2 permit such continued residential occupation of CBI. This court has no authority to order
 3 what FERC alone is empowered to dictate. As in *Save Our Streams*, any attempt by this
 4 court *at this time* (given the lack of any decision by FERC) to mandate the future use of
 5 the Project property would constitute “an attempt to restrain the licensing procedures
 6 authorized by FERC”, would be “an assault on an important part of the FERC license”
 7 and could result “in substantial disruption of the statutorily mandated licensing
 8 procedure.” Plaintiffs have adequate remedies available to them through FERC
 9 procedures and, if necessary, appeals, to obtain a determination whether, or to what
 10 extent, private use of CBI will be allowed in the future.

11 **2. Damages claims and claim for specific performance of the PUD alleged**
 12 **obligation to seek approval of lease extension**

13 In addition to specific performance and injunctive relief regarding Plaintiffs’
 14 ability to occupy CBI through at least 2023, Plaintiffs Complaint also seeks damages for
 15 breach of contract and violations of the Fifth and Fourteenth Amendments of the United
 16 States Constitution. Plaintiffs argue “[r]egardless of what action FERC may take
 17 concerning the nature and extent of future uses of CBI, Homeowners are entitled to seek
 18 constitutional and state law remedies for the PUD’s *failure to keep its commitments*” -
 19 including the PUD’s obligation to seek FERC 's approval of the extension of the leases.
 20 ECF 45 at 2-3, 15 (emphasis added). Plaintiffs also claim they are entitled to specific
 21 performance of the PUD’s obligation to seek FERC approval of their leases.

22 As Plaintiffs point out, the PUD has expressly acknowledged that the Plaintiff's
 23 monetary and specific performance claims, other than the request for specific
 24 performance of the 2023 lease termination date in order to grant them the right to occupy
 25 CBI, are not matters for determination by FERC. In its Answer filed with FERC to the
 26 Plaintiffs intervention in the SMP proceedings, the PUD stated therein:

27 While Grant PUD’s compliance with any ‘due process’ requirements under state
 28 law in association with its final SMP and its decision to cease residential use of
 CBI upon expiration of the lease with the Port of Quincy is not a matter for
 Commission inquiry, Grant PUD believes it has complied with all state
 requirements in this regard. Similarly, the various parties’ rights and obligations

1 under the various leases, sub-leases, and amendments thereto with respect to CBI
2 are matters to be resolved in state forums and not by the Commission...

3 ECF No. 43, Ex. B at 309 n. 8.

4 The PUD presents in its Reply a table of like contentions made by Plaintiffs both in
5 the underlying Complaint herein as well as in the FERC proceedings. ECF No. 58 at 5-6.

6 However, the overlap of evidence, as opposed to issues, is insufficient to preclude
7 this court from hearing a given claim. The PUD also contends in its Reply that Plaintiffs'
8 position "overlooks Commission decisions such as *East Bay Mun. Util Dist.*, 64 FERC
9 P61043 (1993) and 66 FERC P61199 (1994). Like the instant case, the *East Bay* case
10 also involved FERC's regulation of the appropriate use of project land which involved
11 long-term tenancies. The Commission adjudicated the tenants' protests to the licensee's
12 proposed recreation plan, which excluded all long-term tenants, as well as the licensee's
13 action in beginning to evict residents from the project area. The Commission directed the
14 licensee to eliminate the long term tenancies, but to allow them an additional two years
15 before requiring relocation. Though that case shows the types of issues within FERC's
16 purview, the same decision also states under the section titled "Tenants' Rights": "As to
17 disputes between tenants, property owners, and a licensee concerning appropriate
18 compensation for actions taken by a licensee under its license, these are matters for
19 resolution in the appropriate state forum."

20 Notably, Plaintiffs have not presented FERC with the issue of whether the PUD
21 has a legal obligation to seek approval of the lease extension. Plaintiffs have advised
22 FERC in the FERC proceedings that it has retained counsel to review this contention and
23 that it "reserves its rights with respect to such matters." ECF No. 40 at 147.

24 Plaintiffs' suit for damages based on breach of contract and for constitutional
25 violations, in part based upon the PUD's alleged failure to seek FERC approval of the
26 leases, are matters this court can and should hear and are issues that FERC has no specific
27 ability or authority to resolve. FERC can not award retrospective damages for breach of
28 contract. Plaintiffs breach of contract and constitutional claims do not seek to modify,
alter or rescind the FERC license, nor are they part of the FERC licensing proceedings,

1 except to the extent of seeking FERC's approval of the extension of the leases, a matter
2 outside the jurisdiction of this court.

3 4 5 **3. Conclusion**

6 Section 8251 of the Federal Power Act does not preclude this court from deciding
7 Plaintiffs' state law breach of contract claims and constitutional claims seeking damages.
8 Accordingly, the court **DENIES** Defendants' request that the court dismiss *the action*.
9 However, Plaintiffs' request for specific performance of their lease asking this court to
10 declare their right to occupy CBI until at least 2023 is, at present time, in conflict with
11 FERC's authority and intertwined with FERC's ongoing proceedings. Whereas FERC's
12 licensing proceedings could dictate the type and term of permissible residential use of
13 CBI, at a minimum, Plaintiffs' claim for specific performance of their lease must be
14 stayed pending a final decision by FERC. This ruling, however, would not preclude the
15 Plaintiff's from seeking injunctive relief against the Defendants, if such were not contrary
16 to the decisions of FERC.

17 The doctrine of primary jurisdiction requires courts to let administrative agencies
18 such as FERC "have the first word," and it applies where the agency has "special
19 competence" over the issue to be decided. *United States v. W. Pac. R.R.*, 352 U.S. 59, 64
20 (1956) (where "enforcement of the claim requires the resolution of issues which, under a
21 regulatory scheme, have been placed within the special competence of an administrative
22 body ... the judicial process is suspended pending referral of such issues to the
23 administrative body"); accord *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115-16 (9th
24 Cir. 2008) (affirming referral of claims regarding telephone service to FCC). A court
25 should ordinarily "delay forging ahead when there is a likelihood that agency action may
26 render a complex fact pattern simple or a lengthy judicial proceeding short." *Golden Hill*
27 *Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51 (2nd Cir. 1994).

28 Accordingly, since the parties did not address this issue in their briefing, the parties

1 are to file at **12:00 P.S.T. on Friday, June 17, 2011**, position statements as to whether
2 this action should be stayed until FERC's licensing proceedings conclude. Each position
3 statement shall also address the appropriate means for maintaining the status quo until the
4 parties rights and obligations, including Plaintiffs' right to occupy CBI, have been
5 resolved by FERC and/or this court.

6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED:**

8 1. Defendant Port of Quincy's Motion to Join (ECF No. 54) is **GRANTED**.
9 Defendants' Motion to Dismiss (ECF No. 37) is **DENIED**.

10 2. The parties shall file their position papers on Friday, June 17, 2011 at noon P.
11 D.T. as to the stay of this action pending completion of FERC proceedings.

12 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
13 furnish copies to counsel.

14 **DATED** this 9th day of June, 2011.

15 s/ Justin L. Ouackenbush
16 JUSTIN L. QUACKENBUSH
17 SENIOR UNITED STATES DISTRICT JUDGE
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